UNITED STATES of America, Appellee,

v.

James BEST, Defendant-Appellant.

Docket Nos. 99-1646(L), 99-1688

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

219 F.3d 192

July 25, 2000, Decided

SUBSEQUENT HISTORY: Petition for Rehearing denied September 19, 2000.

PRIOR HISTORY: Appeal from conviction in United States District Court for the Northern District of New York, case no. 97-CR-0428. Judgment entered October 21, 1999. District Court's decision of September 22, 1999, denying Best's motion for judgment of acquittal or, in the alternative, a new trial, reported at 70 F.Supp.2d 129.

DISPOSITION: Affirmed

COUNSEL: STEVEN D. CLYMER, Assistant United States Attorney, Syracuse, New York (Daniel J. French, United States Attorney for the Northern District of New York, Syracuse, New York, on the brief), for Appellee.

BROWN, PINNISI & MICHAELS, Ithaca, New York (Michael D. Pinnisi, Peter M. Stein, Ithaca, New York, of counsel), filed a brief for Defendant-Appellant.

JUDGES: Before: KEARSE, CARDAMONE, and WALKER, Circuit Judges.

OPINION BY: KEARSE, Circuit Judge:

Defendant James Best appeals from a judgment of conviction entered in the United States District Court for the Northern District of New York following a jury trial before Thomas J. McAvoy, then-Chief Judge, convicting him of aiding and abetting a fraud against the United States, in violation of 18 U.S.C. §§ 1031 and 2, and sentencing him principally to three years' probation. On appeal, Best contends (1) that the trial court improperly admitted in evidence a codefendant's out-of-court statement that the codefendant intended to ask Best to create a fraudulent document, (2) that the evidence was insufficient to support his conviction, and (3) that he received ineffective assistance of counsel. Finding no merit in his contentions, we affirm.

I. BACKGROUND

The present prosecution of Best and his codefendant Jerome Maciejewski arose out of the 1992 operations of WholeHealth Insurance Network, Inc. ("WIN" or the "Company"), a private insurance company in New York State that had a contract with the United States Health Care Financing Administration ("HCFA"), which administers the Medicare program. WIN's contract with HCFA ("the Medicare contract") called for WIN to process certain Medicare claims, respond to beneficiary and provider requests for information, and deal with requests for reviews and hearings. The contract prohibited WIN from using Medicare funds for its private business costs.

In a six-count indictment, Maciejewski was charged principally with causing fraudulent claims to be submitted to

HCFA at various times in 1992; Best was charged in one count with aiding and abetting the submission of such fraudulent claims beginning in May 1992. Best and Maciejewski were tried jointly, and each defendant was convicted on the counts against him. Only Best's conviction is at issue on this appeal. The evidence at trial, taken in the light most favorable to the government, showed the following.

WIN's operations were divided among three divisions, headquartered respectively in Albany, Buffalo, and Binghamton. Each division had a "professional relations" department that served as a liaison between the Company and the health care providers who submitted claims for reimbursement. WIN's Medicare business was handled in its Binghamton division, which was also known as its "Upstate Medicare Division"; the Company's Albany and Buffalo divisions were involved only in private insurance, not Medicare. The employees in the Albany division's professional relations department were not trained to do Medicare-related work and did not do such work. Best was a senior vice president of the Company and was chief operating officer of the Albany division.

In April 1992, Maciejewski became the Company's chief operating officer, with responsibility for all three divisions. Because WIN was having serious financial difficulties, Maciejewski began to cut corporate costs and sought other sources of funds, including increased payments from HCFA.

Evidence as to Maciejewski's plans for obtaining increased payments from HCFA was introduced at trial largely through the testimony of Robert Gastle, an employee in the Company's finance department who was responsible for the Company's Medicare budgeting and reporting process. In that capacity, Gastle reported to Martin Benz, who reported to David Voss,

the Company's vice president of finance. Gastle testified that in May 1992, Maciejewski instructed him to inform Voss that Maciejewski wanted 50 percent of the expenses of the Buffalo division's professional relations department to be reallocated to Medicare, retroactively to January 1992. As a result of such an increased allocation, the Buffalo division would receive more money from HCFA on the Medicare contract, which would help fund WIN's non- Medicare expenses. Maciejewski said he would have the Buffalo professional relations representatives distribute Medicare materials at meetings with the western New York provider community in order to justify the allocation; but he did not indicate that the representatives had been making such distributions since January 1992, and in Gastle's view such distributions could not justify allocating 50 percent of that department's expenses to the Medicare contract.

Gastle relayed Maciejewski's instructions to Voss, but Voss balked at carrying them out unless they were in writing. When Gastle reported Voss's response to Maciejewski, Maciejewski called Voss "wimpy" and expressed displeasure at being forced to put his instructions in writing. The government introduced evidence that Maciejewski nonetheless promptly prepared a Medicare reallocation memorandum to Voss, instructing that 50 percent of the Buffalo division's professional relations department expenses be reallocated to the Medicare contract, retroactively to January 1, 1992. Maciejewski's secretary testified that she typed the memorandum to Voss, at Maciejewski's request, on May 6, 1992. The memorandum was backdated to February 3, 1992, and was apparently received by Voss on June 3, 1992; however, the secretary testified that the word-processing program she used showed that the document was generated on May 6. Maciejewski's memorandum stated as follows:

> As you know, we have recently discussed the Professional Relations (PR) activity that Buffalo is performing for our

> Medicare division. With this in mind, it seems reasonable to allocate 50 percent of the PR cost centers to the Medicare division. This activity was reinstituted on January 1, 1992, therefore, this allocation should be retroactive to that date. If you have any questions, please contact me.

(Memorandum from Jerry Maciejewski to David Voss, dated "February 3, 1992.")

Over Best's objection, Gastle further testified that when he reported to Maciejewski Voss's refusal to implement the Medicare reallocation without written instructions, "Mr. Maciejewski told [Gastle] that he would call Albany and talk to Jim and take care of it with the Albany division" (Transcript ("Tr."), at 689). The government introduced evidence that Maciejewski and James Best were friends; that beginning on or about May 13, Maciejewski attended a series of meetings with Best in Albany and had daily contact with him; and that sometime between May 13 and May 15, Best wrote Voss instructing that 50 percent of the Albany division's professional relations department expenses be reallocated to the Medicare contract, retroactively to January 1, 1992. Although Best's Medicare reallocation memorandum was backdated to February 18, 1992, Voss received it on May 15. Best's secretary testified that Best had asked her to type the memorandum during the second week of May; and Best testified that he wrote the memorandum within a day or two of his May meetings with Maciejewski. The Best memorandum stated as follows:

> Per this morning's conversation, please make the necessary adjustment in the cost allocation system to properly credit this department for its Medicare involvement. Since the first of the year, Jerry Maciejewski has asked us to assist the Medicare B Operation by having our Professional Relations Representatives disseminate various medicare information to our providers when they are making routine provider contacts and calls.

> Therefore, would you please allocate 50% of the Department to the Binghamton Division retroactive to January 1, 1992.

(Memorandum from James W. Best to David Voss, dated "February 18, 1992.")

In June 1992, following the instructions received in the Maciejewski and Best memoranda, Gastle had the documentation prepared and made the journal entries necessary to implement the retroactive increases in the Medicare contract allocations. As a result of the change in allocation, a total of $459,992 of WIN's professional relations costs for the two non-Medicare divisions was falsely allocated to the Medicare contract between January and September 1992, including $164,780 for the Albany division, for which Best was responsible.

Best testified at trial in his own defense. While acknowledging that it would have been improper to order the reallocation of Albany division expenses to the Medicare contract unless its employees were actually doing Medicare work, Best stated that he believed at the time he wrote the memorandum that the professional relations employees in the Albany division were in fact doing Medicare work. Further, Best denied ever having discussed the Medicare contract allocation with Maciejewski. He testified that he had sent his memorandum to Voss because he was instructed to do so by Voss. He testified that Voss told him to send the memorandum, Voss provided the language, and Voss instructed him to backdate it. Best also stated that he had believed Voss was involved in manipulating financial data used to determine insurance rates; but, Best testified, he had "[a]bsolutely" complied with Voss's instructions without question. (Tr. 2196-97.) Best conceded that, in the Company hierarchy, he was senior to Voss.

The jury returned a verdict of guilty. The district court denied motions by Best for a judgment of acquittal and imposed a sentence of probation as indicated above. This appeal followed.

II. DISCUSSION

On appeal, Best contends principally (1) that the trial court improperly allowed Gastle to testify that Maciejewski said he intended to ask Best to send Voss a Medicare reallocation memorandum for the Albany division, and (2) that the evidence as to his knowledge of Maciejewski's scheme to defraud the government was insufficient to support his conviction of aiding and abetting. Best also contends that his Sixth Amendment right to effective assistance of counsel was violated by his counsel's performance. Finding no merit in his contentions, we affirm the judgment.

A. Maciejewski's Statement of Intent To Call Best

The government informed defense counsel prior to trial of its intent to offer in evidence Gastle's testimony that in May 1992 Maciejewski had stated that he would speak to Best about instructing Voss to make reallocations to the Medicare contract for professional relations department expenses of the Albany division. The government argued that Maciejewski's statement expressed an intent to perform a future act and thus fell within the exception to the hearsay rule set out in Fed.R.Evid. 803(3) ("statement of the declarant's then existing ... intent" is not excluded by the hearsay rule). Best argued that Maciejewski's statement should not be admitted against Best, arguing that

> the only time that you can use 803(3) against a nondeclarant ... is if there is independent evidence corroborating that the intent actually took place. For example, if they say I'm going to have a meeting with so and so. There has to be eyewitnesses that the meeting later took place if they want to

> use that statement against a co-defendant who is a nondeclarant.

(Tr. 5.) Best argued that "the only connection" between Best and Maciejewski "is going to be this phone call," in which "anything could have been discussed," and that there would be insufficient corroboration to permit introduction against Best of Maciejewski's statement of intent to call Best. (Tr. 9.) The government argued that the statement was admissible against Best not to show conduct by Best, but rather to show that Maciejewski proceeded to speak to Best as Maciejewski had told Gastle he would; the government argued that there was sufficient independent evidence of Best's own conduct that corroborated the proposition that Maciejewski had indeed followed through on his intent to speak to Best with regard to the fraudulent allocations.

Following that pretrial colloquy, the district court reserved decision. During the trial, the court concluded that the Gastle testimony as to Maciejewski's statement of intent to call Best was sufficiently corroborated and hence would be admitted:

> [Best's memorandum] contained substantially the same information that the Maciejewski memoranda contained. It was backdated to the same time. It was issued contemporaneous, almost with the time the statement was alleged to be made. So the Court thinks that's sufficient corroborative evidence to ... allow to be admitted against Best. There has to be corroborative evidence. That's clear. The Court thinks that's sufficient.

(Tr. 328.)

In challenging this ruling, Best contends that the statement was improperly offered to prove his conduct and intent, that there was insufficient corroboration of the statement, and that the court's view of the timing of the Best and Maciejewski memoranda was mistaken. We disagree.

A declarant's out-of-court statement as to his intent to perform a certain act in the future is not excludable on hearsay grounds. *See* Fed.R.Evid. 803(3) ("[a] statement of the declarant's then existing state of mind ... such as intent" is "not excluded by the hearsay rule"). If relevant, such a statement may be introduced to prove that the declarant thereafter acted in accordance with the stated intent. *See, e.g., Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295-96, 12 S.Ct. 909, 36 L.Ed. 706 (1892); *see also* Fed.R.Evid. 803 Advisory Committee Note to Paragraph (3) (1972) ("The rule of *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706, ... allowing evidence of intention as tending to prove the doing of the act intended, is ... left undisturbed.").

In several cases, this Court has discussed whether a declarant's out-of-court statement of intent was admissible in evidence against a person other than the declarant. *See, e.g., United States v. Delvecchio*, 816 F.2d 859, 863 (2d Cir.1987); *United States v. Nersesian*, 824 F.2d 1294, 1325 (2d Cir.), cert. denied, 484 U.S. 957, 108 S.Ct. 355, 98 L.Ed.2d 380 (1987); *United States v. Badalamenti*, 794 F.2d 821, 825-26 (2d Cir.1986); *United States v. Sperling*, 726 F.2d 69, 73-74 (2d Cir.), cert. denied, 467 U.S. 1243, 104 S.Ct. 3516, 82 L.Ed.2d 824 (1984); *United States v. Cicale*, 691 F.2d 95, 103 (2d Cir.1982), cert. denied, 460 U.S. 1082, 103 S.Ct. 1771, 76 L.Ed.2d 344 (1983). In each of these cases, we concluded that admissibility turned on whether there was independent evidence that connected the declarant's statement with the non-declarant's activities.

In *United States v. Cicale*, for example, the declarant on several occasions told an undercover agent that he was about to meet with his drug "source," to whom he never referred by name, at specific locations such as "the guy's house" or "at the restaurant where he's at" "right now." 691 F.2d at 103 n.2.

Soon after each such statement, the declarant was either seen with Cicale or seen arriving at Cicale's home. *See* 691 F.2d at 103. We concluded that the observations of Cicale meeting with the declarant promptly after the declarant stated he was about to meet with his "source" were independent evidence that Cicale was the "source" referred to by the declarant and that Cicale had engaged in narcotics trafficking.

Following the reasoning of *Cicale*, we held in *United States v. Sperling* that a declarant's statement that she was going to meet with her drug source at noon that day was admissible to prove Sperling's participation in a drug conspiracy where law enforcement agents observed Sperling meeting with the declarant at the appointed time, and no one else met with the declarant from 11:30 a.m. to 2 p.m. *See* 726 F.2d at 73-74. In *United States v. Delvecchio*, an informant stated that he was going to meet with defendants Delvecchio and Amen to set up a drug transaction. A meeting ensued, and law enforcement agents observed Amen drive to the meeting site and get out of the car and approach the informant. However, the passenger in the car never got out and the agents could not see his face. We held that the informant's statement was not admissible to prove that Delvecchio attended the meeting because there was no independent evidence that he had done so.

Corroboration of the nature of the transaction need not be eyewitness observations and may be provided by circumstantial evidence. Thus, in *United States v. Badalamenti*, the declarant stated that he would meet the defendant at a particular time and place to obtain a heroin sample; we held that there was sufficient corroboration to admit that statement against the defendant in light of the government's evidence that the defendant met the declarant at the location specified in the declarant's statement and that after the meeting, the declarant had samples of heroin. *See* 794 F.2d at 825-26.

In the present case, there was ample circumstantial evidence to corroborate the proposition that Best was the person Maciejewski said he would ask to prepare a Medicare reallocation memorandum for the Company's Albany division. Best's name is James, and Maciejewski said he would call "Jim"; Best and Maciejewski were friends, permitting the inference that it was not improbable that Maciejewski would refer to Best by nickname; and Maciejewski said he would have "Jim" take care of the matter with respect to the Albany division, and Best was in charge of the Albany division.

There was also ample independent proof that Maciejewski thereafter made such a request of Best. The record included evidence that Maciejewski made his statement to Gastle in early May; that Maciejewski thereafter wrote a memorandum on May 6 instructing Voss to make the fraudulent reallocations with respect to the Buffalo division; that on May 13, Maciejewski met with Best; and that Best, within a day or two of meeting with Maciejewski, wrote a memorandum to Voss with respect to the Albany division that was in substance identical to the memorandum written by Maciejewski. Best's conduct was proven not by Maciejewski's statement of what he would ask Best to do, but rather by the direct evidence of what Best did. We see no error in the district court's admission of Maciejewski's statement against Best.

B. Sufficiency of the Evidence

To convict a defendant on a theory of aiding and abetting, the government must prove that the underlying crime was committed by a person other than the defendant and that the defendant acted--or failed to act in a way that the law required him to act--with the specific purpose of bringing about the underlying crime. *See, e.g., United States v. Labat*, 905 F.2d

18, 23 (2d Cir.1990); *United States v. Wiley*, 846 F.2d 150, 154 (2d Cir.1988); *United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir.1985). To prove that the defendant acted with that specific intent, the government must show that he knew of the proposed crime. *See, e.g., United States v. Pipola*, 83 F.3d 556, 562 (2d Cir.), cert. denied, 519 U.S. 869, 117 S.Ct. 183, 136 L.Ed.2d 122 (1996); *United States v. Di Stefano*, 555 F.2d 1094, 1103 (2d Cir.1977); *United States v. Gallishaw*, 428 F.2d 760, 763 (2d Cir.1970); *see also Nye & Nissen v. United States*, 336 U.S. 613, 620, 69 S.Ct. 766, 93 L.Ed. 919 (1949) (aiding and abetting theory supports liability when the defendant "consciously shares in" the underlying criminal act). To be culpable, the defendant need not know all of the details of the crime, *see, e.g., United States v. Grubczak*, 793 F.2d 458, 463 (2d Cir.1986), if the evidence shows that he "joined the venture, shared in it, and that his efforts contributed towards its success," *United States v. Wiley*, 846 F.2d at 154 (internal quotation marks omitted); *see also United States v. Aiello*, 864 F.2d 257, 263 (2d Cir.1988).

Here, the underlying crime was "knowingly execut[ing], or attempt[ing] to execute, any scheme or artifice with the intent ... to defraud the United States," 18 U.S.C. § 1031(a)(1), in connection with requests for Medicare contract payments. Best contends that the evidence was insufficient to show that he had the requisite knowledge. We disagree.

A defendant seeking to overturn a conviction on the ground that the evidence was insufficient bears a heavy burden. *See, e.g., United States v. Desimone*, 119 F.3d 217, 223 (2d Cir.1997), cert. denied, 525 U.S. 874, 119 S.Ct. 174, 142 L.Ed.2d 142 (1998); *United States v. Abelis*, 146 F.3d 73, 80 (2d Cir.), cert. denied, 525 U.S. 1009, 119 S.Ct. 527, 142 L.Ed.2d 437 (1998). The government's proof need not exclude every possible hypothesis of innocence, *see, e.g., United States*

v. Desimone, 119 F.3d at 223; *United States v. Malpeso*, 115 F.3d 155, 164 (2d Cir.1997), cert. denied, 524 U.S. 951, 118 S.Ct. 2366, 141 L.Ed.2d 735 (1998), and where there are conflicts in the testimony, we defer "to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir.1998); *see, e.g., United States v. Miller*, 116 F.3d 641, 676 (2d Cir.1997), cert. denied, 524 U.S. 905, 118 S.Ct. 2063, 141 L.Ed.2d 140 (1998).

These principles apply whether the evidence being reviewed is direct or circumstantial. *See, e.g., Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Valenti*, 60 F.3d 941, 945 (2d Cir.1995); *United States v. Sureff*, 15 F.3d 225, 228 (2d Cir.1994). The jury is entitled to infer from circumstantial evidence that a party had knowledge of a particular fact despite the party's trial testimony denying such knowledge. *See, e.g., Smith v. California*, 361 U.S. 147, 154, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *United States v. Villegas*, 899 F.2d 1324, 1338-39 (2d Cir.), cert. denied, 498 U.S. 991, 111 S.Ct. 535, 112 L.Ed.2d 545 (1990); *Young v. Abrams*, 698 F.2d 131, 135-36 (2d Cir.1983).

The weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal. *See, e.g., United States v. Roman*, 870 F.2d 65, 71 (2d Cir.), cert. denied, 490 U.S. 1109, 109 S.Ct. 3164, 104 L.Ed.2d 1026 (1989). Pieces of evidence must be viewed not in isolation but in conjunction. *See, e.g., United States v. Podlog*, 35 F.3d 699, 705 (2d Cir.1994), cert. denied, 513 U.S. 1135, 115 S.Ct. 954, 130 L.Ed.2d 897 (1995). We must reject the sufficiency challenge if, viewing all the evidence in the light most favorable to the prosecution, we conclude that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original).

In the present case, we conclude that the evidence was sufficient to permit a rational juror to infer that Best knew of, and sought to contribute to the success of, Maciejewski's proposed fraud. Proof of the underlying fraudulent scheme was overwhelming. The evidence showed that Maciejewski wanted to reduce costs in order to help the Company and save his job; that he decided improperly to shift some unreimbursable costs onto the Medicare contract so that the government would pay for those costs; and that he sent a memorandum to Voss instructing Voss to make the fraudulent cost allocations and to make those allocations retroactive.

The proof that Best knowingly sought to assist in Maciejewski's fraudulent scheme was circumstantial but sufficient. The record included the evidence that Maciejewski asked Best to instruct Voss to reallocate 50 percent of the Albany professional relations expenses to the Medicare contract; that Best knew it would be improper to allocate private business costs to the Medicare contract without a valid reason; that Best's memorandum instructing Voss to implement that reallocation was sent shortly after Maciejewski met with Best; that Best's memorandum referred to instructions by Maciejewski; that Best's memorandum, in all significant particulars, matched the fraudulent memorandum that Maciejewski had written a week earlier, to wit, both memoranda were backdated to February, both ordered the allocation of precisely 50 percent of the professional relations costs to the Medicare contract, and both specified that the allocation should be retroactive to January 1, 1992; and that Best, who supervised the Albany professional relations department, had no basis for believing that the Medicare reallocation he ordered was legitimate when he wrote his

memorandum.

Although Best claimed that he had written his memorandum because he was instructed to do so by Voss, the jury was entitled to discredit that testimony as entirely implausible, given the evidence that Best was responsible for supervising the Albany professional relations department and would have been familiar with any change in the type of work done by his division, that Voss had no involvement in the operation of the professional relations department in Albany, and that Voss ranked lower in the Company than Best and had no authority over Best.

From the government's evidence, a rational juror could easily infer that Maciejewski and Best had discussed Maciejewski's fraudulent plan and that as a consequence of those discussions, Best wrote his memorandum for the purpose of contributing to the success of Maciejewski's fraudulent scheme.

C. The Claimed Ineffective Assistance of Counsel

Finally, Best contends that his trial counsel's representation was ineffective because he (a) failed to argue that Best's memorandum to Voss was written prior to Maciejewski's memorandum and (b) failed to call witnesses to vouch for Best's personal integrity and to corroborate his testimony as to "comptroller influence over cost-allocation memos, the lack of supervisory control by Best over the company comptroller, and frequent supervisor reliance upon subordinates for the accuracy of financial information" (Best brief on appeal at 33). These contentions need not detain us long.

To establish a claim of constitutionally ineffective assistance of counsel, a convicted defendant must show both (1) that counsel's performance fell below an objective standard of

reasonableness, and (2) that but for the deficiency, the likely outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Best has not met either prong of this test. Actions or omissions by counsel that " 'might be considered sound trial strategy' " do not constitute ineffective assistance. *Id.* at 689, 104 S.Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). Counsel's election to forgo an unsupported argument plainly falls into this category. Similarly, counsel's decision as to "whether to call specific witnesses—even ones that might offer exculpatory evidence—is ordinarily not viewed as a lapse in professional representation." *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir.), cert. denied, 522 U.S. 846, 118 S.Ct. 130, 139 L.Ed.2d 80 (1997); *see also United States v. Smith*, 198 F.3d 377, 386 (2d Cir.1999) ("The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." (internal quotation marks omitted)).

In the present case, Best has not shown that the decisions he criticizes fell below an objective standard of reasonableness. It was hardly unreasonable, for example, for counsel not to argue that Best's memorandum was written before Maciejewski's, given that there was no proof that that was so and there was compelling evidence that Maciejewski's was written on May 6 and that Best's was written on May 13. Nor do we see anything unreasonable in counsel's decision not to call the potential witnesses. Calling witnesses to testify regarding Best's reputation for truthfulness would have opened the door for the government to attack Best's character; the decision whether to expose a defendant to such an attack is surely a tactical decision that cannot be second-guessed. With respect to Company procedures, the proposed witnesses' testimony as to whether

Best would have taken instruction from Voss would have been speculative.

In any event, given the strength of the government's case, discussed in Part II.B. above, we cannot conclude that there is any likelihood that different performance by counsel would have altered the outcome of the trial.

CONCLUSION

We have considered all of Best's arguments on this appeal and have found them to be without merit. The judgment of conviction is affirmed.

UNITED STATES of America,

v.

Jerome MACIEJEWSKI and James Best, Defendants.

No. 97-CR-0428.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

70 F.Supp.2d 129

Sept. 22, 1999.

DISPOSITION: Motion denied.

COUNSEL: Office of the United States Attorney, Syracuse, for the United States; Steven D. Clymer, AUSA, of counsel.

Dreyer, Boyajian Law Firm, Albany, NY, for Defendant Best; William J. Dreyer, of counsel.

Brown, Pinnisi Law Firm, Ithaca, for Defendant Best; Michael D. Pinnisi, of counsel.

JUDGES: THOMAS J. McAVOY, Chief Judge

OPINION BY: THOMAS J. McAVOY

OPINION: MEMORANDUM—DECISION & ORDER

THOMAS J. McAVOY, Chief Judge:

Defendant James Best ("Best") was convicted by a jury of

aiding and abetting in the execution of a scheme to defraud the United States in violation of 18 U.S.C. § 2 (aiding and abetting) and the Major Fraud Act, 18 U.S.C. § 1031. Currently before the Court is Best's motion pursuant to Fed. R. Crim. P. 29 for a judgment of acquittal or, in the alternative, pursuant to Fed. R. Crim. P. 33 for a new trial.

I. BACKGROUND

Because the Court is presented with Best's motion pursuant to Fed. R. Crim. P. 29, the following evidence is presented in the light most favorable to the government. *See Jackson v. Commonwealth of Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); *United States v. Stephenson*, 183 F.3d 110, 113 (2d Cir.1999).

In 1992, Jerome Maciejewski ("Maciejewski") and Best were senior executives of WholeHealth Insurance Network, Inc. ("WIN") [FN1], a non-profit health insurance company. WIN had divisions in Buffalo, Albany, and Binghamton. Maciejewski was the Chief Operating Officer ("COO") of WIN's Binghamton Division, known as the Upstate Medicare Division ("UMD"). Best was the COO of the Albany Division.

> FN1. In December 1992, WIN merged with Blue Cross of Western New York to form Blue Cross Blue Shield of Western New York.

The Buffalo and Albany divisions were primarily involved in the sale of private health insurance policies. The UMD, however, had a contract with the Health Care Financing Administration to process claims for Part B of the Medicare Program. *See* 42 U.S.C. § 1395j, et seq.

The federal government contracts with "carriers" for the

administration of Medicare benefits. *See* 42 U.S.C. § 1395u. The UMD was the Medicare Part B carrier responsible for processing Part B claims for health care providers in Central, Western, and Upstate New York.

Under the Medicare contract, the federal government paid WIN's costs of administering the Medicare program. *See* 42 U.S.C. § 1395u(c). However, WIN's costs pertaining to the administration of its private health insurance programs would not be paid for by the government. In order to ensure proper payments from the government, each carrier was required to report all Medicare- related costs to HCFA on a monthly and yearly basis.

In 1991 and 1992, WIN was experiencing financial difficulties. In an effort to cut costs, in 1991, WIN consolidated the mailroom operations of its three divisions into the UMD. In or about April 1992, Maciejewski was promoted to Executive Vice President and COO of WIN. Thus, he had responsibility for all three WIN divisions. Best continued to act as COO for the Albany division.

Shortly after his promotion, Maciejewski directed that fifty percent (50%) of the postage costs of WIN's private insurance business be allocated to the Medicare program. This resulted in increased costs being charged to Medicare.

Each of the three WIN divisions had a professional relations department that educated health care providers about the billing practices necessary to submit claims for payment. The UMD was primarily responsible for providing professional relations with respect to the Medicare program and, accordingly, was reimbursed by Medicare for the costs of such professional relations. The Albany and Buffalo divisions were primarily responsible for providing professional relations with respect to

their private health insurance business and, thus, their provider relations costs were not reimbursable by Medicare. While the Albany division did provide some Medicare-related professional relations services until 1990, such Medicare-related activity had ceased by 1992.

In May 1992, Maciejewski instructed an employee in the Buffalo accounting department, Robert Gastle, to allocate fifty percent (50%) of the costs of the Buffalo and Albany professional relations departments to Medicare. Maciejewski also instructed that the allocation be made retroactive to January 1, 1992. Gastle relayed this information to WIN's comptroller, David Voss. Voss, however, expressed a reluctance to allocate non-Medicare costs to the Medicare program without written instructions.

After learning of Voss's hesitancy, Maciejewski told Gastle that he would generate a memorandum for Voss. Maciejewski also stated that he would "take care of it with Jim Best," *see* Def. Mem. of Law at 2.

On or about May 6, 1992, Maciejewski had a memorandum prepared directing Voss to reallocate fifty percent (50%) of the Buffalo division's professional relations costs to Medicare, and to make the allocation retroactive to January 1, 1992. [FN2] The memorandum was back-dated to February 3, 1992. The trial evidence demonstrated, however, that the Buffalo division was not, in fact, performing any Medicare-related professional relations. As a result of the memorandum, private business costs were allocated to the Medicare program.

FN2. The memorandum reads as follows:

Date: February 3, 1992
To: David Voss

Subject: Professional Relations Activity
From: Jerry Maciejewski

As you know, we have recently discussed the Professional Relations (PR) activity that Buffalo is performing for our Medicare division. With this in mind, it seems reasonable to allocate 50 percent of the PR cost centers to the Medicare division. This activity was reinstituted on January 1, 1992, therefore, this allocation should be retroactive to that date.

If you have any questions, please contact me.

On or about May 14, 1992, Best authored a memorandum similar to that of Maciejewski. [FN3] The Best memorandum requested that Voss "make the necessary adjustment in the cost allocation system to properly credit this department for its Medicare involvement." The memorandum further stated that "[s]ince the first of the year, Jerry Maciejewski has asked us to assist the Medicare B Operation by having our Professional Relations Representatives disseminate various [M]edicare information to our providers when they are making routine provider contacts and calls." As did Maciejewski, Best requested that fifty percent (50%) of the Albany division's provider relations costs be allocated to Medicare retroactive to January 1, 1992. As noted, however, in 1992, the Albany division's professional relations department had no involvement with the Medicare program. Similar to the Maciejewski memorandum, Best's memorandum was back-dated to February 18, 1992. As a result of Best's memorandum, private business costs were allocated to the Medicare program.

FN3. The memorandum reads as follows:

Date: February 18, 1992
Subject: BSNENY Professional Relations Dep't

(Cost Allocation)

From: James W. Best

Per this morning's conversation, please make the necessary adjustment in the cost allocation system to properly credit this department for its Medicare involvement. Since the first of the year, Jerry Maciejewski has asked us to assist the Medicare B Operation by having our Professional Relations Representatives disseminate various medicare information to our providers when they are making routine provider contacts and calls.

Therefore, would you please allocate 50% of the Department to the Binghamton Division retroactive to January 1, 1992.

Based on the foregoing, and other evidence adduced at trial, Best was convicted on one count of aiding and abetting the execution of a scheme to defraud the United States in violation of 18 U.S.C. §§ 2 and 1031.

Presently before the Court is Best's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 or, in the alternative, a new trial pursuant to Fed. R. Crim. P. 33.

II. DISCUSSION

A. Rule 29 Standard

A defendant challenging the sufficiency of the evidence following a conviction bears a heavy burden. *See United States v. Ragosta*, 970 F.2d 1085, 1089 (2d Cir.), cert. denied, 506 U.S. 1002, 113 S.Ct. 608, 121 L.Ed.2d 543 (1992). "A conviction will be upheld if, 'after viewing the evidence in the light most favorable to the prosecution,' the reviewing court finds that 'any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson*, 99 S.Ct. at 2789); *see also Stephenson*, 183 F.3d 110, 120 (2d Cir.1999); *United States v. Zagari*, 111 F.3d 307, 327 (2d Cir.), cert. denied, 522 U.S. 983, 118 S.Ct. 445, 139 L.Ed.2d 381 (1997). All reasonable inferences and all issues of credibility must be resolved in favor of the jury's verdict. *See United States v. Allah*, 130 F.3d 33, 45 (2d Cir.1997), cert. denied, 524 U.S. 940, 118 S.Ct. 2347, 141 L.Ed.2d 718 (1998); *United States v. Reyes*, 157 F.3d 949, 955 (2d Cir.1998).

Best moves for judgment of acquittal on the ground that there was insufficient evidence to establish liability under 18 U.S.C. § 2 (aiding and abetting). Specifically, Best argues that there was insufficient evidence for a fair-minded jury to conclude beyond a reasonable doubt that at the time he issued the memo to Voss he knew it was part of a scheme to defraud the government, or that he intended to defraud the government.

Pursuant to 18 U.S.C. § 2(a), "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

To be convicted of aiding and abetting, the defendant must have taken some conscious action that furthered the commission of the underlying crime. The government must therefore prove the underlying crime was committed by someone other than the defendant and that the defendant himself either acted or failed to act with the specific intent of advancing the commission of the underlying crime. To show specific intent the prosecution must prove the defendant knew of the proposed crime--suspicion that it might occur is not enough--and had an interest in furthering it. In sum, to prove the act and intent elements for aiding and abetting the commission of a crime, the evidence must demonstrate that

the defendant joined and shared in the underlying criminal endeavor and that his efforts contributed to its success.

United States v. Pipola, 83 F.3d 556, 562 (2d Cir.) (internal citations omitted), cert. denied, 519 U.S. 869, 117 S.Ct. 183, 136 L.Ed.2d 122 (1996). In short, to convict a defendant of aiding and abetting, the government must prove: (1) the commission of the underlying crime by a person other than the defendant; (2) that the defendant had the specific intent to assist in the commission of the underlying crime; and (3) that the defendant undertook a voluntary act or omission in order to assist the underlying crime. *See United States v. Wiley*, 846 F.2d 150, 154 (2d Cir.1988).

1. The Commission of the Underlying Crime by Someone Other than Best

Best does not argue that the government did not satisfy this element. Nonetheless, the government proved that the underlying substantive offense of a violation of 18 U.S.C. § 1031 was committed by Maciejewski or another. Accordingly, the government satisfied the first element of proving aider and abettor liability.

2. Specific Intent

The jury reasonably could have inferred from the evidence that Best knew of the proposed crime. *See United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir.1985). In his memorandum to Voss, Best states that "[s]ince the first of the year [January 1, 1992], Jerry Maciejewski has asked us to assist in the Medicare B Operation by having our [Albany] Professional Relations Representatives disseminate various medicare information to our providers." However, Best knew that the Albany division had not performed any Medicare-

related work in 1992 and that the allocation was not justified. Best also knew that it was improper to allocate private business costs to the Medicare program without a valid reason. Thus, a reasonable jury could conclude beyond a reasonable doubt that Best was asking Voss to do something illegal--allocate non-Medicare costs from the Albany division to the Medicare Part B program. *See id.*

Moreover, the memorandum plainly states that this was done in conjunction with requests from Maciejewski to assist in the Medicare Part B operations. Thus, a reasonable jury could conclude that Best was acting in response to discussions with Maciejewski. In light of the foregoing, it takes no great logical leap for a jury to find that Best and Maciejewski had discussed allocating the costs from the Albany professional relations division to the Medicare Part B program, that Best knew that Maciejewski intended to allocate non-Medicare costs to the Medicare Part B program, and that Best knew it was illegal. Knowing this, Best nevertheless prepared the memorandum, back-dated it, and sent it to Voss. A reasonable jury could infer from this that Best acted with the requisite intent.

The jury's conclusion is further supported by other evidence admitted at trial. For instance, Voss declined to allocate private provider relations costs to Medicare without written instructions. Maciejewski responded that he would prepare a memorandum and "take care of things with Jim Best." Thereafter, both Maciejewski and Best prepared substantially similar memoranda requesting that fifty percent (50%) of the professional relations costs of the Buffalo and Albany divisions, respectively, be allocated to the Medicare Part B program. Both Best's and Maciejewski's memoranda were prepared during the same time frame, May 1996. Furthermore, both memoranda were back-dated to February 1992. It would certainly be reasonable for a jury to find that these similarities

between the Maciejewski and Best memoranda were more than coincidental. A jury could reasonably deduce from this, beyond a reasonable doubt, that Maciejewski had discussed with Best allocating non-Medicare related professional relations costs to the Medicare Part B program. Thus, the government presented sufficient evidence from which a fair-minded jury could find beyond a reasonable doubt that Best joined and shared in the underlying criminal activity.

There also was other sufficient evidence from which the jury could find, beyond a reasonable doubt, that Best acted with the intent to defraud. Best attempted to justify the allocation of non-Medicare professional relations costs to the Medicare program by falsely stating in his memorandum that he had been assisting in "the Medicare B Operation by having our Professional Relations Representatives disseminate various medicare information to our providers." However, as previously noted, Best knew that this was not true. Best knew that such a reallocation of costs would result in the federal government paying for private business costs. A jury could conclude beyond a reasonable doubt that Best had the specific intent to defraud based on the fact that he provided a false reason for allocating costs to the Medicare program. The fact that Best back-dated his memorandum is further evidence of intent. A jury could reasonably infer from the totality of the evidence before it that, by back-dating the memorandum, Best attempted to make the retroactive allocation appear legitimate; that is, that Best prepared the memorandum shortly after the Albany division purportedly began performing Medicare-related services, rather than six months after the fact.

3. Voluntary Act

Finally, a fair-minded jury could conclude beyond a reasonable doubt that Best's drafting (or directing the drafting) of the

memorandum ordering the reallocation of private business costs to the Medicare program constituted a voluntary act to assist in the completion of the underlying crime. Although Best contends that he prepared the memorandum at Voss's request, the jury reasonably could have discounted this evidence in light of the evidence that Best was Voss's superior and, thus, Voss could not direct Best to do ***135** anything. Furthermore, the jury reasonably could have determined that Voss was reluctant to reallocate costs to the Medicare program absent written authorization. Best provided the written authorization, thereby indicating that he initiated the authorization.

For the foregoing reasons, the Court finds that the government presented sufficient evidence from which a fairminded jury could reasonably conclude beyond a reasonable doubt that Best was guilty of aiding and abetting the commission of a major fraud against the United States in violation of 18 U.S.C. §§ 2 and 1031.

B. Standard Under Rule 33

Pursuant to Rule 33, a new trial may be granted if "required in the interest of justice." Fed. R. Crim. P. 33; *see also*, *United States v. Moreno*, 181 F.3d 206, 212 (2d Cir.1999). The decision to grant a motion for a new trial pursuant to Fed. R. Crim. P. 33 rests within the discretion of the trial judge. *See United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir.1992), cert. denied, 514 U.S. 1038, 115 S.Ct. 1404, 131 L.Ed.2d 291 (1995). Such motions are disfavored, *see United States v. Gambino*, 59 F.3d 353, 364 (2d Cir.1995), cert. denied, 517 U.S. 1187, 116 S.Ct. 1671, 134 L.Ed.2d 776 (1996), and should be granted only "in the most extraordinary circumstances." *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir.1993), cert. denied, 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365

(1994). The burden of proving the need for a new trial lies with the defendant. *See United States v. Sasso*, 59 F.3d 341, 350 (2d Cir.1995). In deciding a Rule 33 motion, the Court may weigh the evidence and determine the credibility of witnesses, *see Sanchez*, 969 F.2d at 1413, and is not required to view the evidence in the light most favorable to the government. *See United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir.1980). Despite this, the Court's discretion is limited; it should only grant a new trial when it "concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred." *Id.*

Best moves for a new trial pursuant to Fed. R. Crim. P. 33 on the ground that he was prejudiced by the joint trial with Maciejewski and that the evidence preponderates heavily against the verdict. Best made similar arguments when he sought severance prior to trial, contending that it was likely that he would be found guilty by association because of the overwhelming amount of evidence against Maciejewski. The Court rejected these arguments, stating that:

> There is a strong preference for a joint trial because of the similarity of the underlying facts and Best does not set forth sufficient grounds for severance. If, at trial, Best feels that he will be prejudiced because the jury will not be able to properly distinguish the evidence against him and Maciejewski, then he may move for an appropriate limiting instruction.

At trial, the Court issued limiting instructions to the jury. Specifically, the Court instructed the jury that it should:

> give separate and personal consideration to each Defendant and to each count charged against him. In this regard, you should consider what the evidence in the case shows with respect to each Defendant and to each offense that each

Defendant is charged with. In sum, each Defendant should be considered individually and each count should be considered separately.

The Court further instructed the jury that:

There are two (2) defendants on trial before you. You must, as a matter of law, consider each count of the indictment and each defendant's involvement in that count separately, and you must return a separate verdict on each defendant for each count in which he is charged.

In reaching your verdict, bear in mind that guilt is personal and individual. Your verdict of guilty or not guilty must be based solely upon the evidence about each defendant. The case against each defendant, on each count, stands or falls upon the proof or lack of proof against that defendant alone, and your verdict as to any defendant on any count should not control your decision as to any other defendant or any other count.

Thus, the jury was adequately instructed to consider the evidence against Best separately from that against Maciejewski, and to consider only that evidence pertinent to the Count with which Best was charged as an aider and abettor. In light of the limiting instructions, and given the similarity of the underlying facts and the connection between Maciejewski and Best, it cannot be said that Best was prejudiced by a joint trial.

As previously discussed above with respect to Best's motion pursuant to Rule 29, the Court rejects the contention that the weight of the evidence preponderated in favor of acquittal. There was sufficient evidence from which a fair-minded jury could conclude beyond a reasonable doubt that Maciejewski and Best had discussed allocating private provider relations costs to the Medicare Part B program, that Best knew that allocating the Albany division's provider relations costs to the

Medicare program was improper, and that Best drafted the memorandum directing that the Albany division's provider relations costs be so allocated in response to his discussions with Maciejewski.

C. Best's Change of Attorneys

Approximately one month after the verdict, Best, through his trial counsel, filed the above-discussed post-trial motion, which was made returnable on the Court's September 13, 1999 motion calendar. In accordance with N.D.N.Y. L.R. 12.1(a) (Criminal Procedure), and N.D.N.Y. L.R. 7.1(b)(2), the government timely filed opposition papers. Best's trial counsel did not seek, and this Court did not grant, leave to file reply papers. *See* N.D.N.Y. L.R. 7.1(b)(2).

After the above-discussed post-trial motions had been fully briefed, filed, and made returnable on the Court's September 13, 1999 motion calendar, Best retained the services of Brown, Pinnisi & Michaels (the "Brown, Pinnisi Firm"). On September 3, 1999, the Brown, Pinnisi Firm entered their appearance on behalf of Best "in post-trial motions and, if necessary, in sentencing matters." *See* Brown, Pinnisi Notice of Appearance, Docket No. 70. By letter dated September 3, 1999, the Brown, Pinnisi Firm wrote this Court requesting a two month extension of time to "acquaint itself with the trial record ... to conduct appropriate legal and factual research ... [and to] be permitted to submit supplemental papers in support of [the post-trial] motion ... [as well as] argue additional grounds in support of the motion for new trial." Because Best's trial counsel prepared the post-trial motions, the post-trial motions had been fully briefed, there was no indication that Best's trial counsel was not representing him fully, adequately, or competently, and Best's trial counsel was obligated to continue representing him until such time as this

Court permitted them to withdraw, *see* N.D.N.Y. L.R. 44.2 (Criminal Procedure), the Court denied, in part, the Brown, Pinnisi Firm's request. Because the government did not object to the Brown, Pinnisi Firm supplementing arguments in the post-trial motion, as opposed to raising new arguments, the Court permitted the Brown, Pinnisi firm to submit supplemental papers. In addressing Best's post-trial motions above, the Court considered these supplemental papers.

The Brown, Pinnisi Firm also submitted a letter requesting that the Court reconsider its denial of the previous request for an extension of time and to raise additional arguments. In this letter, the Brown, Pinnisi Firm took the liberty of setting forth the new arguments.

The Court denies the Brown, Pinnisi Firm's motion for reconsideration and declines the invitation to consider these new arguments. Even if the Court considered these submissions as part of the supplemental papers or as a Reply Brief, "new arguments may not be made in a reply brief." *The Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999). Considering these new arguments at this late stage would not allow the government an opportunity to respond. The Court cannot permit the briefing of the post-trial motions to continue ad infinitum. *See Tetra Technologies, Inc. v. Harter*, 823 F.Supp. 1116, 1120 (S.D.N.Y. 1993) ("Nor may entirely new but foreseeable points relevant to a motion be presented in a reply.... Were tactics of this type to be permitted, a sur-reply affidavit would be necessary from the adversary, followed by a further supplemental response by the moving party, and so on ad infinitum.").

Best, through his trial counsel, had a full and fair opportunity to present his post-trial motion. As noted, there is no indication that Best's trial counsel did not competently and

adequately brief the post-trial motion. Accordingly, the Court "decline[s] to entertain the theories so proffered." *Id.*

III. CONCLUSION

For the foregoing reasons, Best's motion for a Judgment of Acquittal pursuant to Rule 29 or, in the alternative for a new trial pursuant to Rule 33, is DENIED.

IT IS SO ORDERED

Relevant orally-given and transcribed findings of fact and conclusions of law of the District Court, entered in conjunction with the judgment sought to be reviewed.

District Court's ruling admitting state-of-mind hearsay evidence of Macie against petitioner Best, tanscribed at page 328 of the trial transcript of June 9, 1999:

MR DREYER [Best's trial counsel]: That's the issue of the Gastle statement about Macie having told him he was going to call Mr. Best in the future.

THE COURT: Right. The question is whether or not – can that be admitted against Best. It's clear it can be against Mr. Maciejewski but the Court thinks, as was state by someone yesterday after reviewing the case law, that if, in fact, the memoranda came out afterwards, signed by Mr. Best to Mr. Voss –

MR. DREYER: Voss.

THE COURT: It contained substantially the same information that the Maciejewski memoranda contained. It was backdated to the same time. It was issued contemporaneous, almost with the time the statement was alleged to be made. So the Court thinks that's sufficient corroborative evidence to be – allow to be admitted against Best. There has to be corroborative evidence. That's clear. The Court thinks that's sufficient.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United states Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of September two thousand.

Present:

Hon. Amayala L. Kearse
Hon. Richard J. Cardamone
Hon. John M. Walker, Jr.
CIRCUIT JUDGES,

USA

Appellee

v. Docket No. 99-1646 (L)

Maciejewski (Best)

Defendant-Appellant

A petition for panel rehearing having been filed herein by James Best.

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: (signature)
Beth J. Meador
Administrative Attorney

Filed: September 19, 2000

18 U.S.C.A. § 1031 MAJOR FRAUD AGAINST THE UNITED STATES

(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—

(1) to defraud the United States; or

(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.

(b) The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and--

(1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or

(2) the offense involves a conscious or reckless risk of serious personal injury.

(c) The maximum fine imposed upon a defendant for a prosecution including a prosecution with multiple counts under this section shall not exceed $10,000,000.

(d) Nothing in this section shall preclude a court from

imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. section 3571(d).

(e) In determining the amount of the fine, the court shall consider the factors set forth in 18 U.S.C. sections 3553 and 3572, and the factors set forth in the guidelines and policy statements of the United States Sentencing Commission, including--

(1) the need to reflect the seriousness of the offense, including the harm or loss to the victim and the gain to the defendant;

(2) whether the defendant previously has been fined for a similar offense; and

(3) any other pertinent equitable considerations.

(f) A prosecution of an offense under this section may be commenced any time not later than 7 years after the offense is committed, plus any additional time otherwise allowed by law.

(g)(1) In special circumstances and in his or her sole discretion, the Attorney General is authorized to make payments from funds appropriated to the Department of Justice to persons who furnish information relating to a possible prosecution under this section. The amount of such payment shall not exceed $250,000. Upon application by the Attorney General, the court may order that the Department shall be reimbursed for a payment from a criminal fine imposed under this section.

(2) An individual is not eligible for such a payment if--

(A) that individual is an officer or employee of a Government agency who furnishes information or renders service in the performance of official duties;

(B) that individual failed to furnish the information to the individual's employer prior to furnishing it to law enforcement authorities, unless the court determines the individual has justifiable reasons for that failure;

(C) the furnished information is based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit or investigation, or from the news media unless the person is the original source of the information. For the purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government; or

(D) that individual participated in the violation of this section with respect to which such payment would be made.

(3) The failure of the Attorney General to authorize a payment shall not be subject to judicial review.

(h) Any individual who--

(1) is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section

(including investigation for, initiation of, testimony for, or assistance in such prosecution), and

(2) was not a participant in the unlawful activity that is the subject of said prosecution, may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

18 USC § 2 PRINCIPALS
(AIDER AND ABETTOR ACT)

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

FEDERAL RULE OF EVIDENCE 802
THE HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

FEDERAL RULE OF EVIDENCE 803(3) THE "STATE OF MIND" EXCEPTION TO THE HEARSAY RULE

The following are not excluded by the hearsay rule, even thought the defendant is available as a witness:

* * *

(3) Then existing mental, emotional, or physical condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Other material petitioner believes essential to understand the petition, included pursuant to Supreme Court Rule 14(i)(vi).

Trial colloquy during which Gastle provided the contested hearsay testimony, tanscribed at page 689 of the trial transcript of June 10, 1999:

Robert Gastle – Direct
Questioning by Mr. Clymer, Assistant United States Attorney

* * *

Q. In addition to the conversation you've already described, when you went back to Maciejewski after talking to David Voss, did Maciejewski mention to you a memo from somebody else?

A. Mr. Maciejewski told me that he would call Albany and talk to Jim and take care of it with the Albany division.

Q. Who was Jim in Albany.

A. Jim Best.

* * *